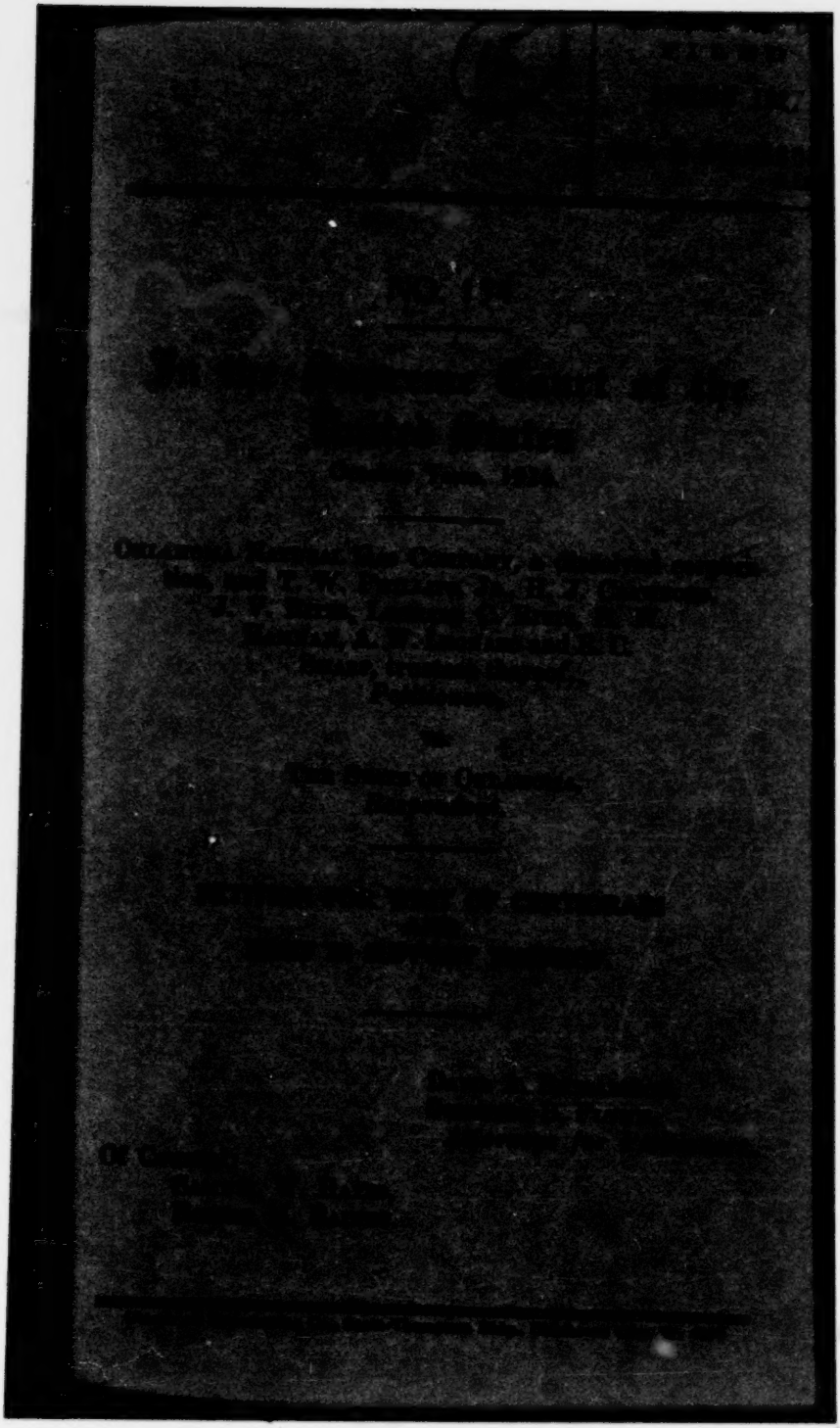

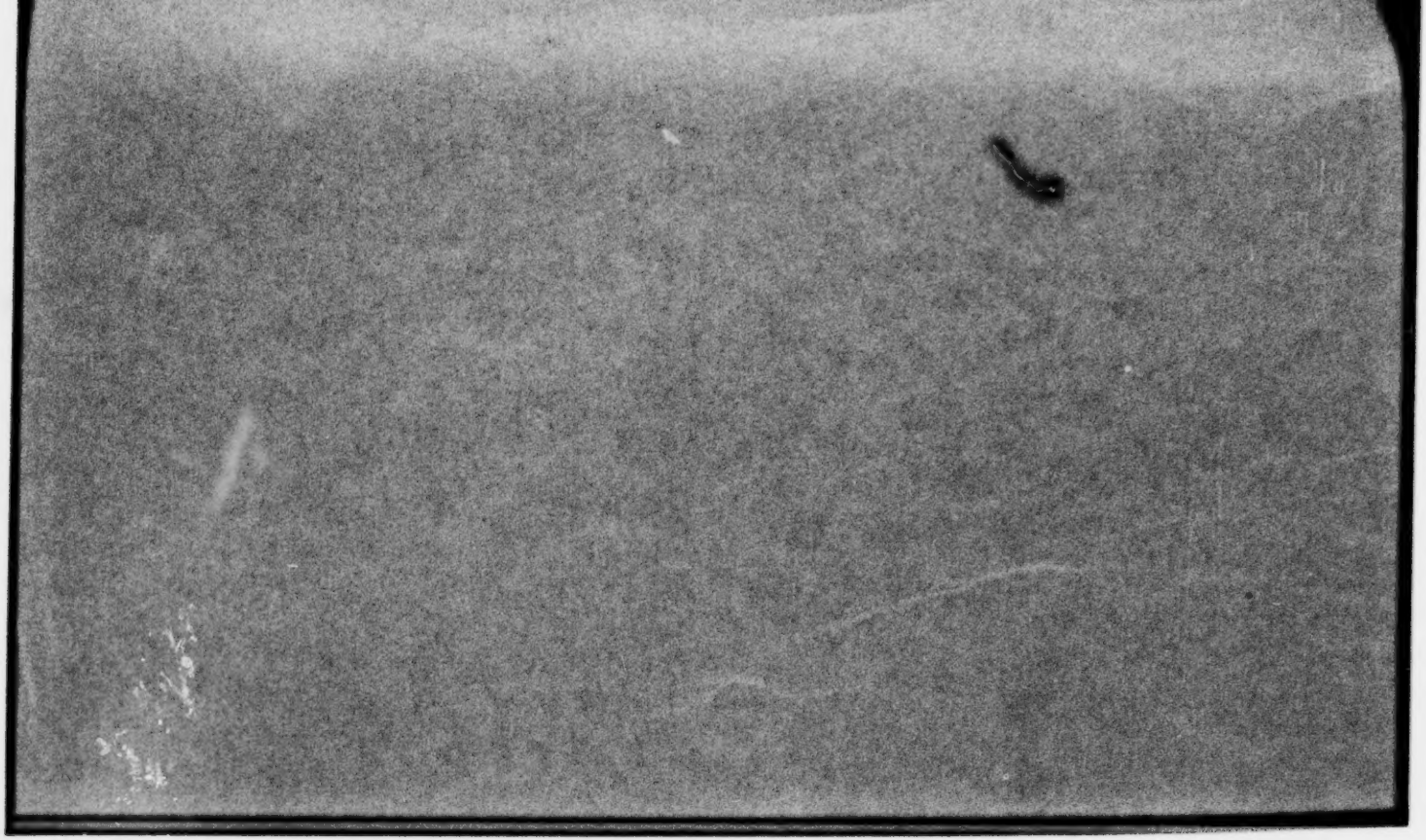

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NO. 154

In the Supreme Court of the United States

October Term, 1926.

OKLAHOMA NATURAL GAS COMPANY, a dissolved corporation, and T. W. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD and R. C. SHARP, trustees thereof,
Petitioners,

vs.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petitioner, Oklahoma Natural Gas Company, then a corporation of the State of Oklahoma, being aggrieved by the judgment of the Supreme Court of Oklahoma rendered on June 2, 1925, in cause No. 11511 therein, entitled "Oklahoma Natural Gas Company, Plaintiff in Error, v. The State of Oklahoma, Defendant in Error," 110 Okl. 297, wherein said Supreme Court affirmed a

judgment of the Corporation Commission of Oklahoma rendered on June 7, 1920, requiring petitioner and Oklahoma Gas & Electric Company, as petitioner's agent, to discount the indebtednesses to them incurred by their patrons in Oklahoma City during November and December, 1919, for natural gas used by the patrons and furnished by the companies as public utilities at the established rates; and the petitioner being uncertain whether, under Section 14 of the Act of Congress approved February 13, 1925, said Act governed the mode of review in this case, and the mode of review under prior law being by writ of error, conformably to Section 237 (C) of the Judicial Code as amended by the Act approved February 13, 1925, it sought and obtained, on June 4, 1925, a writ of error to the Supreme Court of Oklahoma to review the judgment rendered in said court. The record was duly certified, filed in this Court and printed, and this petitioner as appellant has prepared and filed its brief therein. Said cause is No. 154, October term, 1926.

Having become convinced that the judgment or decree mentioned in Section 14 of the Act approved February 13, 1925, with respect to this case means the judgment or decree rendered by the Supreme Court of Oklahoma and not the judgment or decree rendered by the Corporation Commission, and therefore that certiorari and not writ of error is the proper remedy, your petitioner, Okla-

homa Natural Gas Company, since dissolved but whose existence is continued for litigating purposes by Section 5361, Compiled Oklahoma Statutes, 1921, and T. W. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, constituting the Board of Directors, and, by said Section 5361 Compiled Oklahoma Statutes, 1921, the liquidating trustees of said corporation, now respectfully pray the Court, pursuant to Section 237 (C) of the Judicial Code as amended by the Act of February 13, 1925, to regard and act on the papers whereon said writ of error was allowed as a petition for a writ of certiorari to the Supreme Court of Oklahoma in said cause, and as if duly presented at the time of the application for said writ of error, and to grant said writ of certiorari, and to review and reverse the said judgment of the Supreme Court of Oklahoma; and as cause for the issuance of said writ, petitioners show:

STATEMENT OF CASE.

I.

Institution of Action, Pleadings and Issues.

This action was instituted by the Corporation Commission of Oklahoma on January 10, 1920, by its order of that date requiring Oklahoma Natural Gas Company, hereinafter called petitioner, and its agent, Oklahoma

Gas & Electric Company, public utilities, to discount the indebtednesses to them incurred by their patrons in Oklahoma City during November and December, 1919, for natural gas used by the patrons and furnished by the companies at the established rates, or to appear before the Commission on January 26, 1920, and show cause for not doing so (R. 9-15). The discounts were ordered, not because the companies did not actually furnish and the patrons actually use the quantities of gas charged for, or because the bills were computed at an unlawful rate, but solely because the companies did not and actually could not furnish their patrons all the gas they wanted, and therefore could not maintain the pressure demanded.

The discounts ordered were 25 per cent during the portions of the months in question when the pressure was below 4 ounces and not below 3; 50 per cent during those portions when the pressure was below 3 ounces and not below 2; 75 per cent while the pressure was below 2 ounces and not below 1; and 100 per cent during the portion of the months when the pressure was below 1 ounce (R. 9-15). From the hourly pressures the average pressure during each day was determined, and from that the average pressure during each month, and the discounts for the month were thus arrived at.

Petitioner, appearing for itself and its agent, Okla-

homa Gas & Electric Company, filed a response to the order to show cause (R. 15-22), in which it alleged:

1. The gas furnished in Oklahoma City was petitioner's property, and was distributed by Oklahoma Gas & Electric Company as its agent for a per centum of the proceeds.

2. Petitioner maintained ample transportation facilities, and had exercised the utmost care and diligence to procure and furnish an adequate supply at the pressure desired. Natural gas, however, is a commodity which only nature makes, and which has natural limitations in the supply thereof; and the shortage and consequent low pressure existed because of the failing and depletion of the supply, notwithstanding petitioner's utmost efforts to provide and furnish a larger supply. Petitioner's obligation to furnish an adequate supply was not absolute, so that it could be denied the right to charge and receive the established rates for the quantity actually furnished solely because it was a physical impossibility to furnish more, but its obligation was only to exercise a high degree of care and diligence to furnish an adequate supply; and to require petitioner to discount its patrons' bills incurred in the past for the quantity of gas actually furnished to and used by them at the prescribed rates merely because it was unable to furnish them all they needed or wanted, would operate to deprive it of its property with-

out due process of law, to deny it the equal protection of the law, and to take its property for public and private use without just compensation, all in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner alleged the facts showing the extreme care and diligence it had exercised, and averred that it had omitted no effort or expenditure that any reasonable, diligent and prudent person engaged in the same business, and upon whom rested the same responsibility, would have made to secure and furnish an adequate supply; and that the shortage and resulting low pressure were due, not to any negligence, carelessness, incompetency or indifference on its part, but solely to the fact that the supply of gas accessible to its lines had greatly failed and was failing, and that it had become an actual physical impossibility to furnish its patrons during periods of extreme cold weather all the gas they wanted at the pressure desired; and that if, under such circumstances, its patrons elected not to use coal, wood or other subsidiary fuel during such periods, but to take petitioner's gas and burn the same, then such patrons were under a legal and constitutional obligation to pay the established rates therefor, and that to require the petitioner to forego any portion of the indebtedness which its patrons had incurred for the gas actually furnished and

used under the established rates, would be to take its property without due process of law, to take it for public and private use without just compensation, and to deny it the equal protection of the law, all in violation of the Fourteenth Amendment.

3. That the order was arbitrary and unreasonable, and therefore violative of the Fourteenth Amendment, in that it took no account of the actual facts with respect to individual consumers; that many consumers in the districts defined in the order used other fuel during the low pressure periods of the months in question and used no gas whatsoever during those periods, or, if any, then only a negligible quantity for cooking purposes; so that the whole, or practically the whole, of the bills incurred by said consumers during said months was for gas used during those periods in the months when the pressure was 4 ounces; but the said order nevertheless required that the discounts be given to each and every consumer residing in the districts defined without regard to the facts with respect to each consumer, thus requiring the discounting of bills for gas furnished at 4 ounces pressure.

4. That the order was also arbitrary and capricious, and therefore violative of the Fourteenth Amendment, in that the discounts ordered were not based upon the relative quantity or density and heating value of the

gas actually furnished at the different pressures named, but were fixed arbitrarily; that the density and heating value of gas at 4 ounces pressure is only 1.7 per cent greater than its density and heating value at atmospheric pressure; its density and heating value at 3 ounces is only 1.25 per cent greater than at atmospheric pressure; its density and heating value at 2 ounces is less than 1 per cent greater than at atmospheric pressure, and its density and heating value at 1 ounce pressure is only about one-half of 1 per cent greater than at atmospheric pressure; and that, to require the enormous discounts upon the indebtednesses for the gas actually furnished and used because of these slight differences in density and heating value, was to ignore the facts, to act arbitrarily and capriciously, and to take petitioner's property without due process of law, and to deny it the equal protection of the law.

5. That the order would also operate to deprive petitioner of its property without due process of law, in violation of the Fourteenth Amendment, in that it provided that gas furnished at less than 1 ounce pressure should be absolutely free of charge.

6. That, although the supply of gas available to petitioner had failed and was failing, nevertheless its investment and overhead expenses were not only undiminished but actually increased; and it was faced with the

necessity of expending each year more than it earned, after paying its operating expenses, as it had done during the three years preceding, in building new lines to other gas fields which lasted only a short time; and since its investment and expenses had increased, but its supply of gas had unavoidably decreased, the price therefor would have to be increased instead of decreased; and that if it was to be required to discount its bills as the supply of gas available to it failed, then it was faced with early bankruptcy.

II.

The Gas Companies, Their Relation to Each Other and to the Public.

Petitioner owned leases and wells from which it produced gas, and it purchased gas produced by others. It owned and operated 1100 miles of gas pipe lines in Oklahoma, and 5 compressor stations with which it pumped the gas through the lines (R. 215-16). It owned the franchises and gas distributing systems in about 35 towns and cities in Oklahoma where it furnished gas to the public directly. In addition, it furnished gas in 6 other towns and cities under contracts with local distributing companies, whereby it produced or purchased the gas, transported it to the towns and cities served, and delivered it into the distributing systems of the local companies to be distributed by the latter as its agent for a per centum of the proceeds thereof.

In May, 1907, a contract was entered into between petitioner and Oklahoma Gas & Electric Company whereby the latter was appointed petitioner's agent to market and distribute its natural gas in Oklahoma City. Petitioner agreed to construct a pipe line from its gas lands and leases to Oklahoma City, and through it to deliver natural gas into the local distributing system for distribution by the latter as petitioner's agent. The second and third paragraphs of that contract are as follows:

> "The gas company agrees that it will, for the period commencing with the completion of its said pipe line and ending October 15, 1927, or at a later period as hereinafter provided, supply and deliver through its said pipe line and through its said reducing and regulating station, natural gas in a volume sufficient to maintain a pressure not to exceed four to eight ounces to the square inch on the lines of the said distributing system, and at all times fully meet the demand for all purposes of domestic consumption as provided for in this contract. *However, as the production of natural gas from wells and the conveying of it over long distances is subject to accidents, interruptions and failures, the gas company does not by this contract undertake to furnish an uninterrupted supply of gas at the pressure named for the period named herein, but only to furnish such a supply of gas at such pressure and for such a period of time as its wells and contracts and pipe line are capable of furnishing.*
>
> "*It is expressly understood, however, that the gas company shall not be liable for any loss, damage or injury sustained by the second party and resulting directly or indirectly from any shortage or interruption in the supply of gas, or in the diminution of the*

pressure thereof, arising from any cause whatsoever, but the gas company agrees to use due diligence in furnishing an adequate supply of merchantable gas for all the domestic consumers the second party may secure within the corporate limits of the City of Oklahoma City as the said limits now exist or may hereafter be established by law, as well as within a radius of five miles from the present or future limits of said city" (R. 265).

Oklahoma Gas & Electric Company agreed to construct a natural gas distributing system in Oklahoma City and have it ready for operation on or before December 23, 1907. It was agreed that petitioner should not be restricted to supplying only Oklahoma Gas & Electric Company with gas, but might supply companies and consumers in other cities and localities, and that if the gas available ever became insufficient to supply all the cities and consumers which it should undertake to supply, then it should prorate its gas among them.

It was agreed that the title to the gas should be and remain in petitioner until sold and delivered to the consumer by the local company as petitioner's agent. The contract was to be in effect until October 15, 1927 (R. 29-30, 188-9, 264-271) and was in full force and effect during November and December, 1919.

Oklahoma Gas & Electric Company at no time had any gas lands, leases or wells of its own, or any pipe line with which to transport gas from the fields to its dis-

tributing system in Oklahoma City, and there was no person or company other than petitioner within 100 miles of Oklahoma City who had a pipe line. Petitioner was at all times the sole source of Oklahoma Gas & Electric Company's supply of gas, and it was a physical impossibility for the latter to distribute any gas except such as it could get from petitioner (R. 188-9), and that fact was known to the Commission and the public.

There were no inter-corporate relations between petitioner and Oklahoma Gas & Electric Company. They had no common officers or directors and, so far as either knew, no common stockholders.

III.

The Hearing and the Facts Which It Developed.

In the hearing it was agreed that the gas was petitioner's property, distributed under a contract by the Oklahoma Gas & Electric Company as petitioner's agent, for a per centum of the proceeds (R. 29-30); and the Commission so found (R. 243).

Also it was agreed that neither the franchises nor the charters of either company contained any provision with respect to the pressure at which gas should be furnished or the quantity which should be furnished (R. 256-7).

The Commission introduced no witnesses whatso-

ever. As the Commission's Attorney stated before that body, "*All the testimony that was introduced was introduced by the company; not a particle, not a scintilla, of evidence was offered by anyone else except the Oklahoma Natural Gas Company*" (R. 247).

Petitioner produced fourteen witnesses, consisting of its officers and employees and those of Oklahoma Gas & Electric Company, and the most competent and prominent gas engineers and experts known to the industry. None of the evidence introduced was attempted to be controverted by the Commission. Petitioner proved, without contradiction or dispute, the following facts:

1. In November and December, 1919, the weather was the coldest known in Oklahoma in 29 years (R. 86). Not a natural gas company in the United States which transported its gas any distance was able to meet the requirements of its patrons. The shortage was serious and nation-wide (R. 85-6, 115-16, 140-1, 164-5).

2. Petitioner had ample transportation facilities with which to furnish in Oklahoma City, had the gas been available, two and a half times the maximum demand there (R. 216). Instead of maintaining only the one pipe line into that city which it contracted to build and maintain, it had built and was maintaining three (R. 215-6). It had in use altogether 1100 miles of pipe lines and 5

compresser stations (R. 215-6). Its pipe lines and compressor facilities were capable of delivering into Oklahoma City 75 million cubic feet per day, and even with industrial consumers on, 30 million cubic feet per day would have been adequate (R. 216). But no industrial consumers were on. Petitioner refused to furnish gas to industrial consumers even in mild weather but saved its gas for domestic consumers on peak load days (R. 235).

3. Petitioner had exercised the utmost care and diligence to procure and furnish an adequate supply at the pressure desired (R. 216, 231-2, 235, 240). That care and diligence dated from the first sign of the failing of the supply early in 1917, and was continuous throughout that year, through 1918 and through the entire year of 1919.

Its total expenditure during 1917 for new lines to new fields was $974,473.09. Its net income during that year was only $78,767.58 (R. 225).

In 1918 its total expenditure in building new lines was $1,632,084.72 and its net income only $1,224,753.52.

In 1919, the very year of the shortage in question, petitioner constructed an additional compressor station, and 82.89 miles of new lines, at a total cost of $1,479,000 and its net income was only $1,534,000 (R. 226-29).

During the three years mentioned it expended $4,

086,145.20 in an endeavor to procure and furnish an adequate supply of gas, and during the same time its net income was only $2,648,120.43, arrived at without deducting from gross earnings the cost of the new lines and compressor station or anything for depreciation or amortization. Those expenditures were made chiefly for the purpose of supplying Oklahoma City with an adequate supply of gas (R. 228-30).

Moreover, petitioner exercised the utmost diligence in attempting to procure the gas itself. It entered into a contract with the Osage Nation and the Secretary of the Interior for the gas under 107,000 acres of land in the Osage, and drilled 17 dry holes there in succession (R. 232). During the summer and fall of 1919 it had drilled assiduously on its own leases (R. 231-2), and when the winter of 1919-20 came it was producing all the gas it could produce and was purchasing all the gas produced by all other gas producers available to its pipe lines (R. 229, 231-3, 240). When winter came it was connected with every foot of gas reached by its lines.

At the time of the hearing before the Commission in January, 1920, when its receipts were the heaviest, it owed current bills amounting to $500,000 and had less than $100,000 with which to pay them (R. 233-4). Practically all of petitioner's earnings are made in the winter when people are heating their homes. In the summer

petitioner operates at a deficit due to the fact that the consumers use only a pittance of gas for cooking purposes (R. 240).

Petitioner entered the winter of 1919-20 with a daily open flow volume of 585 million cubic feet (R. 221), being all the gas it could produce and all it could purchase. There was not a particle of gas available to its lines anywhere that it was not taking (R. 224).

Compiled Oklahoma Statutes 1921, sections 7913, 7915 and 7916, and good gas practice, restricted the amount of gas that could be taken daily from any well to 25 per cent of the daily open flow volume. Petitioner therefore had available for all the towns and cities served by it 25 per cent of 585 million cubic feet daily, or 146 million cubic feet. It had this quantity on November 3, 1919 (R. 218-19, 221). If the winter had been normal and the gas wells had held up normally this would have been more than adequate. But when the unprecedented cold weather came there was such an enormous and continuous consumption of gas, constituting such an enormous drain upon the wells, that, although petitioner continued to purchase all the additional gas brought in and to bring in new wells itself wherever it could (R. 220), by December 1, 1919, this 585 million cubic feet had gone down to 345 million cubic feet, a reduction of 240 million cubic feet in 25 days (R. 221). This was less than the demand

The gas was being taken out of the lines by the consumers faster than the wells could produce it. This rendered petitioner unable to keep its lines full and therefore unable to furnish the quantity or maintain the pressure desired.

4. Petitioner's issued capital stock was $14,300,000, and the value of its property used and useful in carrying on its business was in excess of $20,000,000 (R. 215-16). Each year since 1917 it had been compelled to invest all it earned and more in compressor stations and new lines to new fields. Even on the basis of its issued capital stock, its earnings were not sufficient to cover its amortization and depreciation, much less to give it a reasonable return on the value of its property (R. 232-3).

5. There is a fixed and definite relation, known in physics as "Boyle's Law", between the volume of natural gas and the pressure at which it can be furnished (R. 250, 253, 254, 256). The pressure varies with the volume or supply. If a natural gas company has a volume of gas sufficient to supply its consumers at a 4 ounce pressure and that volume becomes reduced, then it is physically impossible to keep up the 4 ounce pressure (R. 251, 253-4, 256). The pressure at which gas may be furnished depends upon the quantity available (R. 251). If the supply available becomes reduced, the company, even by the use of compressors, cannot continue to fur-

nish gas at a 4 ounce pressure. If it could, then as the volume continued to be reduced and finally reached zero, it could still go on furnishing gas at 4 ounces pressure. Pressure is merely indicative of the rate of flow through the lines.

The amount of gas which a compressor can pump is determined and limited by the rock pressure of the gas in the wells, which feeds the gas into the compressors (R. 251-2, 254). In order that a compressor may pump an adequate quantity of gas, there must be an adequate quantity for it to pump; and in order that it may keep up the pressure there must be a quantity of gas going into it at least equal to the amount being consumed (R. 254).

6. The discounts ordered bore no relation in fact to the deficiency in the density of and the heat units in the gas actually furnished. (R. 35-6, 39, 54-5, 85, 94, 107-8, 139-40, 148-9, 159-60, 165).

The difference in quantity or density and heat units between 1,000 cubic feet of gas furnished at 4 ounces and 1,000 cubic feet furnished at 3 ounces is only 4 cubic feet and such heat units as 4 cubic feet contain, which difference is four-tenths of 1 per cent. For this deficiency the order requires a deduction of 25 per cent from the bills. The difference in quantity and heat units between 1,000 cubic feet furnished at 4 ounces and 1,000 cubic feet

furnished at 2 ounces is only 9 cubic feet, or nine-tenths of 1 per cent; yet for this deficiency the order requires a deduction of 50 per cent from the bills. Also, the difference between 1,000 cubic feet at 4 ounces and 1,000 cubic feet at 1 ounce is only 13 cubic feet, or 1.3 per cent; but for this deficiency the order requires a deduction of 75 per cent from the bills. Lastly, the difference between 1,000 cubic feet at one-half ounce and 1,000 cubic feet at 4 ounces is only 15 cubic feet, or 1.5 per cent. Yet for that deficiency the order annuls the entire bill. (R. 39, 54, 85, 107-8, 139-40, 148-9, 159-60).

7. A pressure ranging from $1\frac{3}{4}$ ounces to 2 ounces actually will give better service than will any pressure above that if the consumers' burners and appliances are properly adjusted, and an arbitrary requirement that 4 ounces pressure be maintained makes for waste and perpetuates bad service. (R. 42, 36-7, 103-4, 150-51, 190-3).

In Kansas City, Missouri, the natural gas company maintains a pressure of only a little over 1 ounce in the homes (R. 46-7). In Wichita, Kansas, the natural gas company maintains a pressure of only 2 ounces (R. 103-4). In Ottawa, Kansas, only $1\frac{3}{4}$ ounces pressure is maintained (R. 150-1). A few consumers in Oklahoma City have adjusted their burners for using gas at low pressure and their service is satisfactory (R. 190-3).

8. The gas companies had been earnest and con-

tinuous in their efforts to teach their patrons the proper adjustment of their appliances and the method of utilizing low pressure gas; but the latter had refused to take any interest in the matter (R. 64, 66-7, 180-286).

During the summer the consumers were continuously warned by the companies to lay in a supply of subsidiary fuel (R. 197-8).

9. The order requires that the discounts be given to thousands of consumers whose entire bills were incurred only when gas was at 4 ounces pressure. In one district defined in the order from 5 to 10 per cent of the consumers used no gas during the low pressure periods of the months in question, and the whole of their bills were incurred during the 4 ounces pressure period of those months (R. 174-6). In another district 10 per cent (R. 176-7), in another 50 per cent (R. 174-5, 177-8), in two others 95 per cent (R. 178-80), and in two other districts, 80 per cent (R. 180-1, 280) of the consumers used no gas during the low pressure periods, and the whole of their bills was incurred during the portions of those months when the pressure was 4 ounces. Nevertheless, the order required that all bills in those districts during the months of November and December be discounted, without regard to whether any part of the bill was incurred during the low pressure period.

IV.

The Final Order.

Petitioner having proved the foregoing facts, the Commission introduced no evidence of any kind or character to dispute them; but on June 7, 1920, it made an order, finding no facts against the companies, but overruling the protest and putting the tentative order into effect (R. 242-3).

V.

The Appeal to the Supreme Court of Oklahoma.

Petitioner appealed to the Supreme Court of Oklahoma, assigning and urging that the order operated to deprive it of its property without due process of law, and to deny it the equal protection of the law, in violation of the Fourteenth Amendment (R. 7-8), for the following reasons:

1. The order is based upon no findings purporting or pretending to authorize or justify the same.

2. The order is not supported by a scintilla of evidence. It is contrary to the undisputable character of the evidence, and purely arbitrary, a mere fiat.

3. Four ounces pressure, the standard prescribed in the order, was adopted wholly without evidence pretending to support or justify it, and in the face of undisputed evidence that it was impossible to maintain it in

extreme cold weather, and that better service could be rendered with 2 ounces pressure; and its adoption was arbitrary and capricious.

4. The order is arbitrary and capricious in that the discounts or rebates ordered were not based upon the relative quantity of gas which a consumer could get in a given time at the various pressures, or upon the relative heating value of the gas furnished at different pressures, or upon both combined. The order is based upon nothing except the Commission's arbitrary will.

5. The order undertakes to impose upon petitioner, the basis of whose service is an exhaustible commodity which man cannot make, an absolute obligation, which petitioner never assumed, to furnish an adequate quantity at 4 ounces pressure at all times, under all circumstances, and at all events; and to impose that obligation notwithstanding it was humanly impossible to fulfill it, and that petitioner had done everything in its power to furnish the amount and pressure desired, and notwithstanding petitioner's rates, even without discounting its bills, did not render it a reasonable return upon the value of its used and useful property; and the order penalizes petitioner for not doing the physically impossible by requiring discounts sixty-two times greater than the reduction in the density and heating units of the gas furnished.

6. The order grants discounts to several thousand consumers whose entire bills were incurred when gas was at normal pressure.

7. The order permits consumers to burn gas twenty-four hours every day when the pressure is less than 1 ounce, which is a usable pressure, and yet denies petitioner any compensation whatsoever for the gas furnished at that pressure.

The Supreme Court of Oklahoma affirmed the order. (*Oklahoma Natural Gas Company* v. *State of Oklahoma*, 110 Okla. 297). It did not discuss the Federal questions involved, but, misinterpreting and misapplying *Oklahoma Natural Gas Company* v. *State of Oklahoma*, 254 U. S. 234, held that they were determined adversely to petitioner by that case.

VI.

Assignments of Error.

In its proceedings by writ of error herein, Oklahoma Natural Gas Company assigned, and petitioners do hereby assign, that the Supreme Court of Oklahoma erred in holding that said order did not operate to deprive petitioner of its property without due process of law, and to deny it the equal protection of the law, both in violation of the Fourteenth Amendment, in each of the seven respects above set out.

VII.

Importance of the Case.

The case is one of great importance for the following reasons:

1. The amount involved is large. While the indebtednesses annulled by the order are stated in per centums instead of dollars, yet it is estimated that the amount involved in Oklahoma City is $50,000.00. In addition to that, the same shortage prevailed during the same period in the other towns and cities served by Oklahoma Natural Gas Company; and, on appealing from the order, the Commission required of it a bond conditioned to discount its bills on the same basis in the other towns and cities served by it if the order is affirmed. The aggregate of these would be much greater than in Oklahoma City.

2. The order was made pursuant to a fixed and continuous policy on the part of the Corporation Commission, arbitrarily to require discounts in periods of shortage, without regard to the conditions causing the shortage, and with no regard to the relation between the discounts and the deficiency in the density and heating value of the gas furnished; and the decision of the State Supreme Court, depriving petitioners of the guaranties of the Fourteenth Amendment, would constitute a precedent in Oklahoma for all future cases of this character.

3. The State Supreme Court misconstrued and misinterpreted the opinion of this Court in *Oklahoma Natural Gas Company* v. *State of Oklahoma*, 258 U. S. 234. It refused to consider the differences in the record in the two cases, or even to notice that every fact constituting the basis of this Court's ruling in that case was either stipulated or proved without dispute not to be true in this case.

4. The State Supreme Court decided the Federal questions of substance in a way not in accord with applicable decisions of this Court. For example, although there was neither evidence nor finding supporting or justifying the adoption of 4 ounces as the standard of pressure, none showing a just or reasonable relation between the discounts ordered and the deficiency in the service, none showing that Oklahoma Natural's transportation facilities, pipe lines and compressors were inadequate in the slightest degree, none showing that it had failed to exercise the utmost care and diligence to procure and furnish the quantity of gas desired at the pressure demanded, none showing that there was a foot of gas available to it which it was not getting and furnishing, none showing that there was one thing which it could have done and did not do to prevent or remedy the shortage, and an abundance of evidence produced by the Companies to the contrary, nevertheless the State Supreme

Court decided the case in a way not in accord with *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.*, 227 U. S. 88; *Northern Pac. Ry. Co.* v. *Department of Public Works*, 268 U. S. 39; *Postal Tele-Cable Co.* v. *City of Newport*, 247 U. S. 464; *State of Washington et al.* v. *Fairchild*, 224 U. S. 510; *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 263; *Interstate Commerce Commission* v. *Union P. R. Co.*, 222 U. S. 541, 547; holding that an administrative order, quasi judicial in character, is void if the finding is contrary to the indisputable character of the evidence, or made without evidence, or if the facts found do not as a matter of law support the order made.

5. Also, it being shown without controversy that the rates for gas then existing, even without discounting the bills, were not sufficient to earn petitioner's amortization and depreciation alone, much less to give it a reasonable return upon the value of its property, and also that it was a physical impossibility for petitioner to procure and furnish more gas than it did furnish, or to furnish what it did furnish at a higher pressure, the effect of the Commission's order and the decision of the State Supreme Court was to condition petitioner's right to collect and receive the compensation previously fixed by the Commission for its gas upon petitioner's furnishing more gas and at a higher pressure than the depleted con-

dition of the gas fields in Oklahoma rendered possible. In other words, the effect of the decision is to condition petitioner's right to collect the prescribed rates, even though they were not compensatory, upon its performing the impossible. To condition a reasonable return, or the collection of an accrued debt, upon the performance of the impossible, is of course to deny a reasonable return or the right to collect the debt, and in either case is to deprive of property without due process of law, in violation of the Fourteenth Amendment.

6. Also, considering that the petitioner had expended each year during the last three years all it earned and more in undertaking to procure sufficient gas to maintain the pressure demanded, and that notwithstanding those huge expenditures it was unable to do so, the State Supreme Court's decision is not in accord with *Wilcox v. Consolidated Gas Company*, 212 U. S. 19, in which this Court said:

> "The evidence shows that to put a pressure such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion and consequent disaster. Before compliance with this provision would be safe the mains and other pipes would have to be strengthened throughout their whole extent, *and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas,*

and the provision as to the amount of pressure is therefore void."

7. The decision wholly fails to distinguish between a natural gas company, which deals in a commodity which only nature makes, the supply of which is limited and exhaustible, which facts condition the quantity and pressure which may be furnished, and other public utilities who manufacture the basic feature of their service from raw material readily purchasable in the open market and who, by the exercise of the necessary care and diligence, can render a predetermined quality of service.

WHEREFORE, the premises considered, petitioners now pray that this Honorable Court, pursuant to Section 237 (C) of the Judicial Code as amended by the Act of February 13, 1925, will regard and act on the papers whereon the writ of error herein was allowed as a petition for a writ of certiorari to the Supreme Court of Oklahoma in said cause, and as if duly presented at the time of the application for said writ of error, and further pray that the Court will grant said writ of certiorari and will review, and upon such review will reverse the said judgment of the Supreme Court of Oklahoma.

DAVID A. RICHARDSON,
STREETER B. FLYNN,
Attorneys for Petitioners.

Of Counsel:
SAMUEL W. HAYES,
ROBERT M. RAINEY.

STATE OF OKLAHOMA
Oklahoma County ss

David A. Richardson, being first duly sworn, on his oath says that he is one of the attorneys for the petitioners in the foregoing cause, and was the attorney for Oklahoma Natural Gas Company who conducted the trial of said cause before the Corporation Commission of Oklahoma and on appeal before the Supreme Court of Oklahoma; that he has read the foregoing petition for writ of certiorari, and knows the contents thereof, and has personal knowledge of the facts therein stated; and that the statements and averments therein made are true.

.....

Subscribed and sworn to before me this.....day of April, 1927.

.....
Notary Public.

My commission expires.....

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NO. 154

In the Supreme Court of the United States

October Term, 1926.

OKLAHOMA NATURAL GAS COMPANY, a dissolved corporation, and T. W. PHILLIPS, JR., H. J. CRAWFORD, J. V. RITTS, LEONARD C. RITTS, R. W. HANNAN, A. W. LEONARD and R. C. SHARP, trustees thereof,
Petitioners,

vs.

THE STATE OF OKLAHOMA,
Respondent.

BRIEF AND ARGUMENT.

Petitioners adopt the brief heretofore filed in behalf of the appellant in this cause; but if the Court finds it too long to read in connection with this application, they submit the following abbreviation thereof.

I.

The Distinction Between This Case and Oklahoma Natural Gas Company v. State of Oklahoma, 258 U. S. 234.

Lest the Court begin its consideration of this case with the impression that it is ruled by *Oklahoma Natural*

Gas Company v. *State of Oklahoma*, 258 U. S. 234, we call attention at the outset to the fact that the records in the two cases are entirely different, and state briefly their distinguishing features.

Generalizing first, every fact constituting the basis of this Court's ruling in that case was either stipulated or proved without dispute or contradiction not to be true in this case. They were as follows:

1. In *Oklahoma Natural Gas Company* v. *State*, *supra*, the company contended that it had furnished the greatest quantity possible; that natural gas cannot be made by man by any expenditure, but is made only by nature; that the shortage was caused by the unavoidable failure of the gas fields and wells; and that, to require it to discount its bills computed at the established rates for the gas actually furnished because it was physically impossible for it to furnish more, operated to deprive it of its property without due process of law in violation of the Fourteenth Amendment.

This Court stated the company's contention, and answered it by construing the Commission's order as follows:

> "The contention is based on a wrong estimate of the action of the Commission and that of the Court. *Neither was based on deficiency in the volume of gas, but upon the failure of the company to transport it under sufficient pressure to render efficient service.*

> • • • We repeat, therefore, the action of the Commission and Court was not, as represented by the Company, a requirement of the impossible."

One basis of the decision, therefore, was a differentiation between the *volume or quantity* furnished and the *pressure* at which it was furnished, and the assumption, because the record was silent on the subject, that although the *supply* was unavoidably deficient in the quantity or volume available to the company, nevertheless it was possible to furnish what was furnished at the *pressure* demanded, and therefore the order was not "a requirement of the impossible."

But here the evidence was explicit and conclusive, and was not pretended to be disputed or controverted, that there is a fixed and definite relation between the volume or supply of gas available and the pressure which can be maintained; that the pressure varies with the volume or supply; that the relation between the volume or supply on the one hand and the demand on the other conditions and determines the pressure; and that, when the demand is greater than the supply, it is humanly impossible to maintain the desired pressure; that pressure is merely indicative of the rate of flow through the pipe lines, and that a requirement that the company maintain a fixed pressure is in fact a requirement that it furnish the volume that will flow through the lines at that pres-

sure; and that such requirement, when it is not possible for the company to procure such volume, is "a requirement of the impossible" (R. 250-8).

Not only were the foregoing facts not controverted, but the Commission did not even find otherwise in the order.

2. This Court seemed of the opinion, from some statement of the Supreme Court of Oklahoma whose decision it was reviewing, that the charters or franchises of the companies were so phrased as to impose upon them, not the usual common law obligation of one in the public service to exercise reasonable care and diligence to supply the demands of the public, but an absolute contractual obligation to supply the full demand at all times, at all events, and under all circumstances, whether physically possible or not. Thus this Court said:

> "Both the Commission and the Supreme Court decided, *construing the charter of the company*, that it, the company, was required to render efficient service, and we concur in that view. * * * We repeat, therefore, the action of the Commission and Court was not, as represented by the company, a requirement of the impossible. *It was simply and clearly the determination of what the franchise of the company required and the obligation to perform it*, and the failure to perform justified a reduction of the fees charged."

But in this case it was expressly stipulated:

"*that neither the franchises of either the Oklahoma*

Gas & Electric Company, or the Oklahoma Natural Gas Company, nor their articles of incorporation or charters, make any provision with respect to the pressure at which gas shall be furnished or with respect to the quantity that shall be furnished." (R. 257).

Of course, the charters and franchises cannot be held to impose an absolute obligation to supply the full demand or to maintain any certain pressure, when it is physically impossible to do so, in the face of the Commission's express stipulation otherwise; and it therefore follows that the company's duty and obligation in those respects were only such as apply generally to persons or corporations in the public service, which is to serve to the extent of their ability and capacity, and to exercise reasonable diligence and care to serve adequately.

3. In its opinion, this Court said:

> "The percentage of reduction and its adequate relation to a deficiency in service were necessarily determined by the Commission from the case as presented to it, and the Supreme Court, upon consideration, affirmed the determination as a just and supported relation."

But here the relation between the discounts ordered and the deficiency in quantity and heat units of the gas furnished was not, and was not pretended to be, "determined by the Commission from the case as presented to it." At no stage of the proceeding was a particle of evidence offered by or on behalf of the Commission upon

that or any other subject, while seven eminently qualified and reputable witnesses testified that the discounts ordered did not in fact bear any relation to the deficiency in the quantity and heat units of the gas furnished; that the ordered discounts were 62 times greater than the reduction in the quantity and heat units of the gas furnished; and, in effect, that the order was a mere arbitrary fiat (R. 39, 54, 85, 107 8, 139 40, 148 9, 159 60).

4. In *Oklahoma Natural Gas Company* v. *State*, *supra*, there was no showing as to the effect of the ordered discounts upon Oklahoma Natural Gas Company; while in this case it was proved and not disputed or controverted, that the established rates, even without discount or deduction, were insufficient to give petitioner the earning required to take care of its amortization and depreciation alone, to say nothing of giving it a reasonable return upon the value of its property (R. 215 16, 232 3); that in the three years last preceding, and in the very year in which the shortage occurred, it had spent vastly more than its earnings had been in an endeavor to procure and furnish an adequate supply of gas at the pressure desired (R. 225, 226 29, 228 30); that at the very time of the hearing it had $500,000 in unpaid bills incurred in undertaking to procure an adequate supply of gas, and less than $100,000 with which to pay them (R. 233 4); and that the ordered deduction from

the bills made an already confiscatory rate more confiscatory.

II.

The order and its affirmance deprive petitioner of its property without due process and deny it the equal protection of the law, in violation of the Fourteenth Amendment, for the reason that the order is based upon no findings purporting or pretending to authorize or justify the same, though by the Oklahoma Constitution such findings are essential to the validity of such orders, and are required by the Supreme Court of Oklahoma as to all other persons, companies and corporations similarly situated.

The Oklahoma Constitution, Art. 9, Sec. 22, as construed by the Supreme Court of the State, provides as an essential part of due process of law in proceedings before the Commission that the Commission shall make findings of fact, and that the facts found must be adequate to support and justify the order made; and, as to all other persons, companies and corporations situated like petitioner, the Oklahoma Supreme Court has held the order invalid unless the findings of fact made were adequate to support the order, or unless an omitted finding was supplied by the evidence.

—*Kansas City So. Ry. Co.* v. *State*, 27 Okla. 806.

Atchison, T. & S. F. Ry. Co. v. *State*, 27 Okla. 820.

St. Louis & S. F. R. Co. v. *Newell*, 25 Okla. 502.

Chicago, R. I. & P. Ry. C. v. *State*, 24 Okla. 370.

Pioneer Tel. & Tel. Co. v. *Westenhaver*, 23 Okla. 226.

St. Louis, I. M. & S. Ry. Co. v. *State*, 28 Okla. 372.

Chicago, R. I. & P. Ry. Co. v. *State*, 83 Okla. 161.

Compare *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, and *Wichita R. & L. Co.* v. *Public Utilities Com.*, 260 U. S. 48.

But here the Commission made no findings purporting or pretending to support or justify the order (R. 242-5), and no omitted finding was supplied by the evidence introduced. Not only did the proceeding not constitute due process of law as prescribed by the Constitution of the State and by the State Supreme Court, but the refusal to apply in this case the constitutional provision uniformly applied to all other persons, companies and corporations similarly situated, was a denial to petitioner of the equal protection of the law.

The discriminatory manner in which a law is administered, by establishing a construction of the law discriminatory in its effect, will render the law violative of the Fourteenth Amendment.

Whitbeck v. *Mercantile Natl. Bank*, 127 U. S. 193.

Ah Sin v. *Wittman*, 198 U. S. 500.

A law is violative of the Fourteenth Amendment

which grants to certain persons a remedy denied to others in like circumstances, or prescribes different rules of decision as between persons or corporations similarly situated.

—*Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.*, 262 U. S. 544.

Corrigan v. *Truax*, 257 U. S. 312.

Bogni v. *Perrotti*, 224 Mass. 152.

III.

The order deprives of property without due process because it is not supported by a scintilla of evidence. It is contrary to the indisputable character of the evidence and purely arbitrary, a mere fiat.

The provisions of the Fourteenth Amendment protecting the rights and property of persons extend to all acts of the State, whether through its legislature, its executive or its judicial authorities, and bind equally judges and legislators. Neither can act in disregard of fundamental laws.

—*Myles Salt Co.* v. *Iberia & St. M. Drainage District*, 239 U. S. 478.

Scott v. *McNeal*, 154 U. S. 34.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Twining v. *New Jersey*, 211 U. S. 78.

Ex parte Virginia, 100 U. S. 339.

Hovey v. *Elliott*, 167 U. S. 409.

Fayerweather v. *Fitch*, 195 U. S. 276.

West Chicago St. R. Co. v. *Illinois*, 201 U. S. 506.

While notice and hearing are essential to due process, they alone do not constitute it. The denial of an asserted federal right by a judicial or quasi-judicial tribunal, even after notice and hearing, but which denial is arbitrary and based upon facts having no support in the record, is a denial of due process.

—*Postal Tel Cable Co.* v. *City of Newport*, 247 U. S. 464.

Interstate Commerce Com. v. *L. & N. Ry. Co.*, 227 U. S. 88.

Northern Pac. Ry. Co. v. *Department of Public Works*, 268 U. S. 39.

State of Washington v. *Fairchild*, 224 U. S. 510.

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Londoner v. *Denver*, 210 U. S. 373.

Interstate Commerce Com. v. *Union Pac. R. Co.*, 222 U. S. 541.

This Court will examine the entire record, including the evidence, for the purpose of determining whether the finding of fact or the order made is arbitrary as being unsupported by the evidence, and therefore whether an asserted federal right has been denied.

—*Kansas City S. R. Co.* v. *Albers Com. Co.*, 223 U. S. 573.

Creswill v. *Grand Lodge*, 225 U. S. 246.

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IV.

The adoption of 4 ounces as the standard of pressure, made without evidence purporting or pretending to support or justify it, and in the face of undisputed evidence that it was impossible to maintain it in extreme cold weather, and, further, that better service could be rendered at a pressure of 2 ounces than at 4, was arbitrary and capricious, and therefore violative of the Fourteenth Amendment.

—*Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88.

Northern Pac. Ry. Co. v. *Dept. of Public Works*, 268 U. S. 39.

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Cases in which standards of gas pressure impossible to maintain have been prescribed are:

—*Kansas City Gas Co.* v. *Kansas City*, 198 Fed. 500.

Consolidated Gas Co. v. *City of New York*, 157 Fed. 849.

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.

V.

The order is arbitrary and capricious, and therefore violative of the Fourteenth Amendment, in that the discounts ordered were not based upon the relative quantity of gas which a consumer could get in a given time at the various pressures, or upon the relative density and heating value of the gas furnished at the different pressures, or upon both combined. The order was based upon nothing except the Commission's arbitrary will.

Assuming, but only for argument's sake, that 4 ounces is the proper pressure at which to measure the quantity of gas furnished, and assuming also that, notwithstanding its most diligent efforts and the continuous expenditure of all its earnings and more, the utility is actually unable to maintain that pressure, then the only discounts which could constitutionally be required would be such per centums as would represent the difference between the quantity and heating value of the gas furnished measured at the pressure at which it was furnished and the same quantity measured at 4 ounces.

The difference in quantity and heat units between 1,000 cubic feet at 4 ounces and 1,000 cubic feet at 3 ounces is only about 4 cubic feet measured at atmospheric pressure and such heat unit as 4 cubic feet con-

tain, which difference is four-tenths of 1 per cent. Yet for that unavoidable deficiency of four-tenths of 1 per cent in quantity and heat units the order in question requires a deduction of 25 per cent from the bills.

Similarly, the difference in quantity and heat units between 1,000 cubic feet at 4 ounces and at 2 ounces is only nine-tenths of 1 per cent; yet for that deficiency the order requires a deduction of 50 per cent from the bills.

Also, 1,000 cubic feet at 1 ounce is only 1.3 per cent deficient in density and heat units as compared with the same quantity at 4 ounces; but for that deficiency of 1.3 per cent the order requires a deduction of 75 per cent from the bills.

Lastly, 1,000 cubic feet at one-half ounce is deficient only 1.5 per cent as compared with the same quantity at 4 ounces (R. 35-6, 39, 54-5, 85, 94, 107-8, 139-40, 148-9, 159-60,165); yet for that deficiency the order annuls the entire bill, while it forbids the utility to disconnect from the consumer, thus permitting the latter to burn petitioner's gas 24 hours per day at any pressure less than 1 ounce free of charge. In this connection, consider again *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, where an order requiring pressures ranging from 1 inch to 2½ inches of water, which in ounces is from six-tenths of an ounce to one and four-tenths (R. 73, 81-3), was held void. Under the Oklahoma order, when the pressure was six-tenths

of an ounce, the consumers could burn it 24 hours per day free of charge. And six-tenths of an ounce is usable pressure. It seemed to satisfy the people of New York, even with artificial gas, which contains only half the heat units of natural gas.

Miss Elifritz, of the Bureau of Mines, during the hearing, fried an egg before the Commission on an ordinary range with only one-tenth of an ounce pressure (R. 60). She testified that she could fry beef steak and boil water at that pressure (R. 61), and that she had baked with an efficient oven at fifteen-hundredths of an ounce (R. 63). If the Commission could validly order discounts at all under the circumstances shown, due process and the equal protection of the law require that its order conform to the facts, and that the discounts be proportioned to the relative density and heat units of the gas actually furnished. This would require that the Commission introduce evidence as to the relative density and heat units of the gas at various pressures. It introduced none, and it utterly ignored the uncontroverted evidence introduced by petitioner.

It is true that gas will flow through the lines more rapidly at 4 ounces than at any lower pressure. Through the same size service pipe it will take a consumer longer to get 1000 cubic feet at 1, 2 or 3 ounces than at 4 ounces. If we leave out of consideration the fact that petitioner

had done everything possible to furnish both the quantity and the pressure desired and had failed only because performance was impossible, and assume that discounts should be required, and that, in determining the reasonableness or arbitrariness of the discounts ordered, both the relative density and heat units of the gas actually furnished at the various pressures and the relative quantity or volume which a consumer was able to get in a given time should be considered, then we have this situation: A service that will furnish 100 cubic feet per hour at a 4 ounce pressure will furnish 86 cubic feet per hour at 3 ounces (R. 42); that is, a consumer can get at 3 ounces 86 per cent of the quantity he can get during the same time at 4 ounces. And this 86 per cent is deficient four-tenths of 1 per cent in density and heat units as compared with that furnished at 4 ounces. Therefore, at 3 ounces the consumer will get 86 per cent of 99.6 per cent, or 86.646 per cent, of the volume and heat units obtainable during the same time at 4 ounces, considering both the density and heat units of the gas furnished and the rate of flow at those pressures. But the Commission orders that he pay only 75 per cent of his bill.

Also a service that will pass 100 cubic feet per hour at 4 ounces will pass 71 cubic feet per hour at 2 ounces (R. 42), and the gas furnished at 2 ounces is deficient in density and heat units nine-tenths of 1 per cent; that is,

it contains 99.1 per cent of the heat units contained in gas at 4 ounces. The consumer therefore is getting 71 per cent of the volume obtainable in the same time at 4 ounces, and the gas which he gets is 99.1 per cent as efficient as it is at 4 ounces. In other words, he is getting 70.361 per cent of the service which he would get in the same time at 4 ounces. Nevertheless, the Commission requires a discount of 50 per cent on his bill.

Again, a service that will pass 100 cubic feet per hour at 4 ounces will pass 50 cubic feet per hour at 1 ounce (R. 42), or 50 per cent of the quantity that would pass at 4 ounces. The gas furnished at 1 ounce is 1.3 per cent deficient in density and heat units. That is, it contains 98.7 per cent of the heat units contained in the same quantity measured at 4 ounces. Considering both the quantity that will pass in a given time and the density and heat units, the consumer would be getting 49.35 per cent of the service obtainable with gas at 4 ounces. But the Commission orders that the bill for gas furnished at 1 ounce shall be discounted 75 per cent, or that the company may collect only 25 per cent of the bill as against 49.35 per cent of service rendered.

The meter correctly registers the amount of gas actually passing through at any pressure (R. 114, 139, 140, 149.50, 160.1, 164.5). When the pressure is 3 ounces and 86 feet per hour is passing through, the meter reg-

isters and the consumer is charged for only the 86 feet actually passing through and not the 100 feet that would pass if the pressure were 4 ounces.

Petitioner does not agree that the time element or rate of flow at the various pressures should be a basis of discount upon the quantity actually furnished if it has been careful and diligent to procure and furnish the amount demanded at the desired pressure and has failed to do so only because it was physically impossible. It contends that under such circumstances it should have its pay for the quantity actually furnished at the established rates, which were fixed by the Commission on an appraisal of its property, and which purported to give it only a reasonable return upon the value of its property without discounting any of its bills; but even if the relative quantities that will flow through the consumers' service pipes in a given time at the various pressures be considered, as well as the relative density and heat units contained in the gas at those pressures, still it is evident that the order is arbitrary and baseless.

The burden was upon the Commission to show by evidence a reasonable relation between the discounts ordered and the density and heating value of the gas furnished.

—*Washington, ex rel.* v. *Fairchild*, 224 U. S. 533.

An order requiring the enormous discounts or rebates without evidence purporting or pretending to show a just relation between them and the deficiency in the quantity, density and heating value of the gas furnished, and in the face of a mass of evidence from numerous reputable witnesses to the effect that there is no just relation between them, is arbitrary and baseless, and therefore operates to deny petitioner due process of law and the equal protection of the law in violation of the Fourteenth Amendment.

—*Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88.

State of Washington v. *Fairchild*, 224 U. S. 510.

Postal Tel-Cable Co. v. *City of Newport*, 247 U. S. 464.

Northern Pac. Ry. Co. v. *Department of Public Works*, 268 U. S. 39.

Chicago, R. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

Londoner v. *Denver*, 210 U. S. 373.

Interstate Commerce Com. v. *Union P. R. Co.*, 222 U. S. 541.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167.

Illinois Cent. R. Co. v. *R. R. Com. of Ky.*, 1 Fed. (2d) 805.

VI.

The order deprives petitioner of its property without due process of law and denies it the equal protection of the law, in violation of the Fourteenth Amendment, because its effect is to impose upon petitioner, the basis of whose service is an exhaustible commodity which man cannot make, an absolute obligation, which it never assumed, to furnish an adequate quantity at 4 ounces pressure at all times, at all events, and under all circumstances; and penalizes it for not doing so, notwithstanding compliance was humanly impossible, and notwithstanding it had done everything in its power to furnish the full amount and pressure demanded and desired, and notwithstanding its rates, even without deduction or discount of bills, did not give it a reasonable return on the value of its property used in rendering the service.

We have shown (1) that neither by its contract with Oklahoma Gas & Electric Company nor by its charter or franchise had petitioner assumed to do anything more than exercise the care and diligence generally required of all in the public service to serve adequately and efficiently; and (2) that petitioner had done everything in its power to furnish the full amount and pressure demanded and desired, and had failed only because accomplishment was impossible; and (3) that petitioner's rates (which were fixed by the Commission upon a valuation of its property, and purported to be so fixed that their application without deduction or discount would merely give it a reasonable return thereon) did not in fact earn an amount sufficient to cover amortization and depreciation alone, to say nothing of a reasonable return.

Inasmuch as none of the foregoing facts were con-

troverted, we shall not discuss them further, but assume them to be true.

The questions then arise: (1) What was the extent of petitioner's obligation? and (2) Could the State through either the Commission or the Legislature condition petitioner's right to charge and receive for its gas actually furnished and used the established rates fixed on the basis of giving it a reasonable return on the value of its property, and which were in fact confiscatory, upon its furnishing more gas and at a higher pressure than the depleted condition of the gas fields and wells in the State made it possible for it to furnish?

(A)

The Distinction Between the Natural Gas Business and Other Public Service.

The foregoing leads to a consideration of a matter not generally understood or realized, namely, the very vital distinction between the natural gas business and all other forms of public service, the great hazard, difficulty and limitations inherent in the former not found in any of the others, due to the nature of the commodity constituting the basis of natural gas service. We notice as briefly as possible these differences.

Of all public utilities, natural gas companies and water companies are the only ones whose basic feature is a commodity which only nature makes and which man

cannot make by the expenditure of any amount of money. But here the resemblance even between a natural gas company and a water company ends. The only thing they have in common is that they both deal in a commodity which only nature makes. Water companies have the advantage of natural gas companies in that the supply of water is constantly replenished by rains and snows, while there is no replenishment of natural gas. If a water company connects its lines with a lake or stream which furnishes a supply adequate for its patrons, then, barring the diversion of the water by artificial means, it will continue to furnish that same supply, year after year, forever. The same elements of nature that placed the water supply there—rains and snows—are still at work keeping up the supply, and will continue so forever. The water company's capital investment is made and is fixed. It need not be added to, and it will never become worthless. If its supply is barely adequate and a shortage results in a period of prolonged drouth, that does not render worthless the investment in the watershed, the dam, the pumping machinery and the pipe lines; for soon the rains and snows fall again, the supply is replenished, and the equipment is in service again. If the water company increases its capital investment, it is for the purpose of selling more water and making more money, not because its existing supply has failed. Its business is permanent and stable.

An artificial gas company manufactures its gas from coal or oil. Artificial gas contains only half the heat units found in natural gas, but sells for prices generally ranging from $1 to $2 per thousand at pressures ranging from ½ ounce to 2 ounces. The artificial gas company puts in its distributing system, its factory and its gas holders. Its capital investment is then made, and its business is permanent and stable. Each year its facilities are capable of serving as many people as they did the year before with the same quantity of gas. If they are enlarged and the capital investment increased, it is for the purpose of serving more customers and making more money. Since the company manufactures its gas from raw material which it can buy in the open market, all that is necessary in the rendition of good service is the expenditure of the necessary amount of money for the purchase of an adequate quantity of the raw material and its conversion into artificial gas.

The same thing is true of an electric light plant, a telephone company and a telegraph company. Their business is permanent and stable. They have about the same demands in the summer that they have in the winter. The demands upon them can be foretold. There are the same number of hours of darkness each year. The same number of people will make the same number of telephone calls and send the same number of telegrams each year. They operate with fair uniformity.

It is not so, however, with a natural gas company. Natural gas cannot be made by man by any expenditure of money. It is made only by nature. It is not evenly distributed over the world. It is not evenly distributed even in the gas producing regions. Even where it is found it exists only in limited and exhaustible quantities. Unlike water, there is no regeneration or replenishment of natural gas. When a gas field is exhausted it is gone forever. Unlike a water company, when a gas company lays a pipe line into a gas field, it cannot use it forever. When that field is exhausted, the company must then build new lines to other fields, if it can find them; thus increasing and pyramiding its capital investment, not for the purpose of taking on new consumers and making more money, but merely for the purpose of continuing to supply its old consumers.

The amount of electricity that dynamos and engines will make is known; the demand is known. The demand is fairly uniform and the supply not hard to create. The demand upon and the available supply of water companies is known. But no natural gas company knows what its potential supply is. It may be connected with an open flow volume of gas measuring more than a half a billion daily, and within a week its supply may be cut in half. An electric light company can manufacture as much or as little current as it wants to, an artificial gas com-

pany as much or as little artificial gas as it wants to; but a natural gas company can get and furnish only such gas as the gas fields available to it will produce and only for such time as the gas fields will produce it. The company cannot control its supply, as can other public service companies.

These differences between the natural gas business and that of other public utilities are recognized by all governmental agencies familiar with the business, and by all persons experienced in the handling of natural gas. Thus, in Bulletin 102 of the Smithsonian Institution, entitled "Natural Gas, Its Production, Service and Conservation," at page 18 it is said:

> "Food and trees can be grown. Water supplies are constantly replenished by nature, but there is no regeneration in natural gas; and when the gas is once used it is gone forever. While no one knows exactly how the natural gas is formed, yet enough facts are known about it to indicate that nature's process was a very slow one. It has taken millions of years to make the present concentrated supplies, and even though gas should now be formed in some parts of the earth's crust, the rate of formation will be so slow as to make such new gas pools of no interest or economic value for centuries, if ever. (R. 49).
>
> "Storage facilities for natural gas are not commercially feasible in the field nor at the delivering end of the transmission line, except the very limited use of existing gas holders in distributing plants. The large variation in service demands must therefore be met by the wells and reserve acreage. That

is, the entire field's operations must be subordinated to the peculiar service demands made on the natural gas company. An interesting contrast with these stringent operating conditions is the large storage equipment in acres of tank farms that may be used to equalize the load in the oil industry." (R. 49).

On page 21 it is said:

"Natural gas is an exhaustible resource that when once used is gone forever. Every time a natural gas company sells 1,000 cubic feet of gas it is selling a part of its property. Furthermore, the number of natural gas consumers is increasing faster than the number of producing wells, thus placing an additional burden on each well, and the wells that are being drilled at the present time have a lower average capacity than wells that were drilled several years ago, in this way making less gas available." (R. 49).

On page 23 of that bulletin it is said:

"*The natural gas business is unique in that it is the only public utility service that does not, and in fact cannot, create the basic feature of the service that it renders to the public.* Manufactured gas companies merely produce their gas from the raw fuel that they can buy in the open market; transportation agencies, like railroads or street railways, can easily create the motive source of their service; water utilities have their water supply constantly replenished by nature; intelligence transmission utilities, like the telephone and telegraph, can easily create the primary source of their service. *However, the natural gas industry is alone in depending entirely on the caprice of nature for first the finding, and secondly the continuity, of the supply of its primary source of public utility service.*" (R. 50).

We have shown that it is impossible to maintain a

given pressure without an adequate supply of gas; that this cannot be done even by means of compressors, which are valuable only for overcoming friction in the line; and that the capacity of compressors is determined by the well pressure and the rate at which the well pressure will feed the gas to the compressors. The adequacy of the service depends upon the quantity of gas available. Unlike every other public utility, all this is fixed by nature, and is beyond the control of man. All that a natural gas company can do is to furnish to its consumers all the gas it has and can get. No amount of money will create any more gas in a gas field. When the company is taking from the fields and wells and furnishing to its consumers all the gas they will produce, it is doing everything it can do. Nothing but the discovery of new fields and the building of pipe lines into them will increase the supply and the efficiency of the service.

In addition to this, no one can tell how long a seemingly adequate supply will last. Wells which in moderate weather give promise of holding up for months and even years, when the peak demand comes and a heavy pull is put upon them are soon exhausted. For example, on November 5, 1919, petitioner had an open flow volume of 585 million cubic feet, which was much more than ample for the heaviest possible demand. By December 1, 1919, that 585 million cubic feet had gone down to 345 million

cubic feet, a falling off of 240 million cubic feet, nearly 43 per cent, in 25 days; and this notwithstanding petitioner was continuing to buy all new gas brought in and to produce all the additional gas it could. There can be little excuse for the diminution of the supply of the basic feature of any other public utility's service. But a natural gas company's supply fails by the consumption of the commodity. There is replenishment in a water company's supply at the same place. There is a continuous replenishment of an electric light company's supply of electricity. The same machinery continues to generate electricity at the same site. The same is true of telephone and telegraph service and of artificial gas. A natural gas company is the only public utility as to which it is not true.

Also a natural gas company is the only public utility which is required to keep pyramiding its capital investment in constantly building new lines to new fields, as they are discovered. It must do this, not for the purpose of enlarging its business, taking on new consumers, and making more money, but merely for the purpose of continuing to serve its same consumers with the same quantity of gas. It is estimated that the average investment per consumer of natural gas companies in the United States is from four to five times as great as the average investment per consumer of any other public utility.

In this connection, the Supreme Court of Oklahoma, in *Oklahoma Natural Gas Co. v. Corporation Commission*, 90 Okla. 84, 92, said:

> "It should be borne in mind that a natural gas public service business is generally more hazardous than the business of any other public utility. The duration of the business is limited by nature, because the commodity in which the utility deals is supplied by nature alone. The supply is limited and is exhaustible, and when exhausted can never be recreated. All that man can do is to find and furnish the supply that nature has created, and when this supply is exhausted the business of the utility is at an end. This is not true of any other public service business. Artificial gas companies, electric light companies, telephone and telegraph companies, and railroad and street railway companies create the basic element of their service; their business is stable and its duration is not limited. The only other public utility which deals in a commodity created by nature only is a water company, and its supply is constantly replenished by nature itself in the falling of rains and the melting of snows. An investment in any of these enterprises is not limited in its duration, but is permanent, and by competent and efficient management an investment therein will yield a permanent return and the company will earn in addition a sum sufficient to take care of depreciation caused by ordinary wear and tear upon the property and replace worn-out equipment, so that the investment is at all times stable. But this is not true of a natural gas utility. When the supply of gas is exhausted, the equipment is worthless except for the price it will bring as junk. A natural gas utility must continually seek additional supply; as new gas fields are discovered, it spends vast sums in extending its pipe lines to these new fields. This expenditure is not made for the purpose alone of increasing

its business, but, of necessity, is made to supply those it is already under the duty of serving, and this expenditure is made with the knowledge that the gas in this field will soon be exhausted and when exhausted the pipe lines thereto serve no further useful purpose. This and many other elements entering into the business distinguish it from all others, rendering its operations more unstable and hazardous than the operation of any other public utility.

(B)

The obligation of one in the public service, unless he has contracted otherwise, is never absolute. He cannot be required to do the unreasonable, much less the impossible. The undertaking to serve does not imply an undertaking to do the impossible. A public utility is bound only to serve to the extent of its ability and capacity and to exercise reasonable care and diligence to serve efficiently.

Waukesha Gas & Elec. Co. v. *Motor Co.* (Wis.) 209 N. W. 590, not yet officially reported.

Houston & T. C. R. Co. v. *Mayes*, 201 U. S. 321.

Pennsylvania R. Co. v. *Puritan Coal Min. Co.*, 237 U. S. 121.

Morrisdale Coal Co. v. *Pennsylvania R. Co.*, 230 U. S. 304.

St. Louis S. W. Ry. Co. v. *Clay Gin Co.*, 77 Ark. 357.

State, ex rel. v. *Chicago, B. & Q. R. Co.*, 71 Neb. 593.

2 Wyman on Public Service Corporations, Sec. 1433.

2 Thornton on Oil & Gas, (3rd ed.) Sec. 611.

United States v. *New River Co.*, 265 U. S. 533.

Humphreys v. *Central Kentucky Nat. Gas Co.*, 190 Ky. 733.

Louisville Gas & Elec. Co. v. *Sherman*, 202 Ky. 648.

Hutchinson on Carriers, (3rd ed.) Sec. 146.

Lovett v. *Hobbs*, 2 Shower 127.

Riley v. *Horne*, 2 Bing. 217.

Peet v. *Railway*, 20 Wis. 594.

Brown v. *Brandt*, 1 K. B. 686.

Jackson v. *Virginia Hot Springs Co.*, 209 Fed. 979.

If petitioner was under a legal obligation to supply the full demands of its patrons at all times, under all circumstances and at all events, whether physically possible or not, then all other public service corporations, railroads, street railways, telephone, telegraph and electric light companies, water companies, and irrigation companies, are under the same legal obligation. But we have yet to find an authority holding that the obligation of any of them is or can be made absolute, or that their established rates for the service actually rendered must be discounted because they are unable to render it promptly or in the fullest measure demanded.

And if the obligation is not and cannot be made ab-

solute as to those forms of public service, how much more so is it true of a natural gas company, which is more disadvantageously situated from the standpoint of controlling the character of the service rendered than is any of them?

In *Oklahoma Natural Gas Co.* v. *State*, 258 U. S. 234, this Court recognized that if the effect of the order were to require petitioner to furnish the quantity or volume demanded when, without fault on its part, it was impossible to do so, then the order would be void. Here it was shown without dispute that pressure is conditioned upon and limited by the volume or supply available, and that requiring the maintenance of a certain pressure is merely requiring the furnishing of such volume as will flow through the consumers' service pipes at that pressure; and that, since the requisite volume was not and could not be made available, the order was a requirement of the impossible.

At common law one in the public service is required to serve only to the extent of his ability. A carrier at common law was required to receive all goods and passengers without discrimination, but "if his coach be full" he was not liable for failing to transport more than he could carry.

—*Hutchinson on Carriers*, 146.

Lovett v. *Hobbs*, 2 Shower 127.

Riley v. *Horne*, 2 Bing. 217.

Peet v. *Railway*, 20 Wis. 594.

An innkeeper or hotel keeper is in the public business; but he is required to serve only to the extent that he has facilities for serving. When all his rooms are full he is not liable because he turns patrons away.

—*Jackson* v. *Virginia Hot Springs Co.*, 209 Fed. 979.

Brown v. *Brandt*, 1 K. B. 686.

In *Waukesha Gas & Electric Co.* v. *Waukesha Motor Co.* (Wis.), 200 N. W. 588 (not yet officially reported), the facts, as stated by the Court, were as follows:

"The Waukesha Gas & Electric Company began an action to recover a balance due from the Waukesha Motor Company, the amount of which is not in controversy. The issue litigated was upon the counter-claim of the motor company for $150,000 damages alleged to have been sustained because the gas and electric company failed to furnish reasonably adequate service in supplying gas and electricity used in the manufacturing plant of the motor company.

"The proof established that there were interruptions in service. The trial court found that such interruptions were due to causes beyond the control of the gas and electric company, and for which it was in no way responsible, such as the freezing of gas mains, inability to procure a proper and adequate supply of coal for the making of gas and the generation of electricity during the period of the World War, or carelessness and lack of diligence on the part of the motor company. The Court further

found that the gas and electric company exercised care, diligence and foresight in the construction of its gas main and electric feed wires, and that it supplied the motor company with gas of sufficient quantity and proper quality, and with a continuous supply of electric current, except at those times when its service was interrupted by conditions which were beyond the control of the gas and electric company. Upon these findings judgment was entered dismissing the counter claim of the motor company."

Upon this state of facts the Supreme Court of Wisconsin held:

"Whether the gas and electric company was supplying gas under its contract or under the duty imposed by Section 1906 of the Statutes, it was the duty of the gas and electric company to furnish reasonably adequate gas, as well as electric, service. *This duty did not make the gas and electric company an insurer of continuous service, if conditions over which it had no control caused interruptions in service, provided that the gas and electric company at all times exercised reasonable and practicable care, foresight and diligence in so constructing, maintaining and operating its plant as to prevent such interruptions so far as practicable.*"

In *Humphreys* v. *Central Kentucky Natural Gas Co.*, 190 Ky. 733, 229 S. W. 117, the second syllabus is as follows:

"Gas company's franchise contract with city, not specifically requiring company to furnish gas in any particular quantity or at any particular pressure, *held to impliedly require company to exercise reasonable care and diligence, considering all the existing circumstances and conditions*, to supply its customers in such city with such quantity and pressure

of gas as their needs, when known to company, might require without discrimination or favor."

In *Louisville Gas & Elec. Co.* v. *Sherman*, 202 Ky. 648, 261 S. W. 1, the second syllabus is as follows:

"A franchise to a gas company, providing that it supply as much as 12,000,000 cubic feet of gas per day to the inhabitants of the city at a pressure at no time of less than 3 ounces to the square inch at the point of consumption, *held* not to create an absolute liability to supply gas at such pressure, in view of a provision therein that the company 'shall take all reasonable precautions and measures necessary to furnish natural gas hereunder,' and the company was excused from absolute compliance where on account of war there was a great drain on the gas fields which lowered the pressure and the company was unable to have gas compressors manufactured because manufacturers were engaged in manufacturing war munitions, and a consumer was not entitled to damages by reason of the low pressure."

Many irrigation companies are in the public service. Like petitioner, the basis of their service is a commodity which only nature makes. Unlike petitioner, there is periodical replenishment of the supply of the commodity in which they deal. If an irrigation company has not bound itself by contract to furnish an adequate supply at all times and under all circumstances, and if, because the fall of snow and rain has been light, it is unable to impound sufficient water to serve all its customers, must it discount its bills for the water actually furnished because, owing to a caprice of nature, it is not able to fur-

nish the full amount desired? The authorities hold not. They hold that an irrigation company is excused from responsibility where failure to supply water is due to inevitable accident or to causes beyond its control and which could not have been foreseen and prevented by the exercise of due and proper care.

—*Mathieu* v. *North American Land, etc. Co.*, 119 La. 896.

Cotton v. *Jennings Irr. Co.*, 108 La. 4.

Landers v. *Garland Canal Co.*, 52 La. Ann. 1465.

Colorado Canal Co. v. *McFarland*, (Tex. Civ. App.) 94 S. W. 400.

Souther v. *San Diego Flume Co.*, 112 Fed. 228.

Leavitt v. *Lassen Irr. Co.*, 157 Cal. 82.

Larimer, etc. Irr. Co. v. *Wyatt*, 23 Colo. 480.

Jackson v. *Indian Creek Reservoir, etc. Co.*, 16 Idaho 439.

Holman v. *Pleasant Grove City*, 8 Utah 78.

Souther v. *San Diego Flume Co.*, 121 Fed. 347, 57 C. C. A. 561.

In *United States* v. *New River Co.*, 265 U. S. 533, this Court held valid an order of the Interstate Commerce Commission authorizing railway companies to put in effect a certain rule for the apportionment of cars among coal mines in times of car shortage. But if the duty to furnish all the cars needed is absolute, certainly the order was void.

In *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321, a statute of the State of Texas requiring railroad companies to furnish cars, regardless of every other consideration except strikes and other public calamities, was held invalid by this Court, the Court saying:

> "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, *we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the State and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other States, or in other places within the same State. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather.*"

Again, on page 331, the Court said:

> "*While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise,*

which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

In *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, the clear implication is that the extent of a railroad's obligation is to make reasonable efforts to supply all the cars needed, and that, when by making such reasonable efforts it could not do so, it was then its duty to distribute the cars available among its patrons without discrimination.

In *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, this Court said:

> "Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. *But that is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The common law of old in requiring the carrier to receive all goods and passengers recognized that 'if his coach be full' he was not liable for failing to transport more than he could carry.* *Hutchinson on Carriers*, 146; *Lovett* v. *Hobbs*, 2 Shower 127; *Riley* v. *Horne*, 2 Bing. 217; *Peet* v. *Ry.*, 20 Wis. 594. The same principle is applicable to those who transport freight in cars drawn by steam locomotives. *The law exacts only what is reasonable from such carriers*—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly if not identically."

The above case says flatly that the obligation of a common carrier, the highest type of a public service corporation, to furnish prompt and efficient service, is not absolute. The court said, "But that is not an absolute right," and "the law exacts only what is reasonable from such carriers."

In St. Louis S. W. Ry. Co. v. Clay Gin Co., 77 Ark. 357, the Court, construing a statute requiring railroad companies to furnish sufficient facilities for the carriage of freight, said:

> "*The statute did not intend to make the duty of carriers to furnish transportation facilities an absolute one, for it would be unreasonable to conclude that the legislature intended to impose upon them duties that, under certain conditions, could not be anticipated by them, and which would be impossible to perform, and yet, for such nonperformance, to exact of them heavy penalties.* The statute under consideration is but declarative of the requirements of the common law as to the duty of furnishing transportation facilities."

See also *State, ex rel., v. Chicago, B. & Q. R. Co.*, 71 Neb. 593, 99 N. W. 309.

In the case at bar petitioner is penalized, not for failure to exercise reasonable care, because the undisputed evidence is that it had exercised the highest degree of care, had done everything humanly possible, but it is penalized for failure to do the impossible. It would be possible for railroad companies to pile up equipment so

as to meet sudden demands. It would be expensive and unreasonable, but it would be possible. It is not possible for a natural gas company to supply more gas than the wells and fields will produce.

2 Wyman on Public Service Corporations, Section 1433, says:

> "Statutes may be passed defining further the obligations of those engaged in public employment to serve all that apply in accordance with their requirements. But if these statutes go so far as to impose an absolute liability upon the proprietors to act at all events, they ask more than a State can require in view of the Fourteenth Amendment. Thus a statute which made it the unqualified duty of a railroad to furnish cars within a certain number of days after request, has been held unconstitutional by the United States Supreme Court on the ground that it would unjustifiably subject to its penalties a railroad which had reasonable excuses for its failure to act in the particular case. The only way in which the State courts can save a statute of this sort is to say that its general language is to be construed in view of the common law obligation which it reinforces, which is subject to many excuses recognized as inherent in the obligation."

In *2 Thornton on the Law of Oil & Gas* (3rd ed.), Section 611, distinguishing the obligation of an artificial gas company which manufactures its supply out of raw material purchasable in the open market, and a natural gas company which cannot do so, it is said:

> "If the supply in case of natural gas should fail, that would be a defense, in case the company had

made all efforts to furnish the gas; for natural gas is an article that cannot be manufactured, a quite different situation from an instance of supplying artificial gas."

See also:

—*Kansas City Gas Co.* v. *Kansas City*, 198 Fed. 500.

Consolidated Gas Co. v. *City of New York*, 157 Fed. 849.

Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.

(C)

The Existing Rates, Even Without Deduction or Discount Were Confiscatory.

Even if the rates fixed in the Commission's rate orders had been conditioned upon or graduated according to the pressure at which the gas was furnished, or upon the company's furnishing the full quantity or volume demanded, (and they were not), nevertheless, if petitioner by the exercise of care and diligence was unable to maintain the standard pressure fixed, and the reduced rates provided for lower pressures were insufficient to give it a reasonable return upon the value of its used and useful property, then such order would be void as depriving it of its property without due process of law, as denying a reasonable return by conditioning it upon the performance of the impossible. *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19.

In the present case, it was shown without dispute

that petitioner's issued capital stock was $14,300,000, and the value of its used and useful property in excess of $20,000,000 (R. 215-6); that during 1917 its earnings in excess of its operating expenses were only $78,767.58, and during that year it expended $974,473.09 in constructing new lines and compressor stations (R. 225); that in 1918 its earnings in excess of operating expenses were only $1,225,752.52, and during that year it expended $1,632,004.72 in building new lines to new fields (R. 226-8); and that in 1919 its earnings for the first nine months were $755,741.25, and its estimated earnings for the year were $1,343,000, while it expended $1,419,667.39 in constructing new lines to new fields (R. 228-9). In none of the years was the cost of the new lines and compressor stations treated as an expense in determining the net earnings. The Commission ruled that petitioner was entitled to at least 8 per cent for depreciation upon its property and to amortize the same by the time the supply of gas is exhausted and the property becomes worthless, and the Supreme Court of Oklahoma on appeal ruled that it should be allowed 10 per cent to cover depreciation and amortization and 8 per cent for return on the property. (*Oklahoma Natural Gas Co. v. Corporation Commission*, 90 Okla. 84, 93). It is evident, therefore, that, even without discounting its bills, petitioner was not earning even the depreciation and amortization, to say nothing of a reasonable return upon the value of its prop-

erty. Indeed, the undisputed evidence was that its earnings did not in fact cover its depreciation and amortization (R. 226-8, 232-3).

Not only is that true, but on September 30, 1919, the Commission put its appraisal engineer to inventorying and appraising petitioner's property as the basis for a rate case. He was engaged upon that inventory and appraisal during the very time of the shortage. That rate case eventuated in Order No. 1886, which was before this Court in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290. The rates fixed in that order purported to be increases over those existing at the time of the shortage in question. Nevertheless, after this Court's decision in *Oklahoma Natural Gas Co.* v. *Russell*, *supra*, the District Court of the United States for the Western District of Oklahoma, three judges sitting, found the increased rates confiscatory and temporarily enjoined them, and following that the Supreme Court of Oklahoma, in *Oklahoma Natural Gas Co.* v. *Corporation Commission*, 90 Okla. 84, also found them confiscatory, even on the basis of the original cost of petitioner's property, refusing to enlarge the rate base because of the increased cost of reproducing the property at existing prices.

VII.

The order deprives petitioner of its property without due process of law because it arbitrarily awards discounts or rebates upon the gas bills for November and December of several thousand consumers whose entire bills during those months were incurred during the 4-ounce pressure period.

The Commission introduced no evidence pretending to show what patrons used gas and who did not during the times of low pressure. It was shown that in Subdivision "B" of District No. 1, from 5 per cent to 10 per cent of the domestic consumers used coal, oil or other fuel during the low pressure periods and used no gas, and that the entire bills of these consumers were incurred during those portions of November and December when the pressure was 4 ounces (R. 174-6); that in Subdivision "C" of that district more than 10 per cent of the consumers used gas only when the pressure was 4 ounces, using other fuel during the low pressure periods (R. 176-7); that in another district at least 50 per cent of the consumers (R. 177-8), in two other districts 95 per cent of the consumers (R. 178-9, 179-80), and in still two other districts 90 per cent of the consumers (R. 180-1, 200), used gas only during those periods in November and December when the pressure was 4 ounces, so that their entire bills for those months were incurred for gas furnished at 4 ounces. Yet the Commission awarded every domestic consumer in each district, respectively, the same discount on his bill.

This evidence was not disputed or contradicted. It was simply ignored. Of course, the award of discounts to thousands to whom, according to the undisputed evidence, none was due, was purely arbitrary.

The indebtedness incurred for the gas used was property. The gas was property. The cancellation or annulment of that indebtedness was a deprivation of property. The cancellation or annulment of that indebtedness without evidence that the debtor was entitled to the cancellation or annulment, and in the face of affirmative evidence that he was not, was a deprivation of property without due process of law.

Davidson v. New Orleans, 96 U. S. 97.

Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403.

VIII.

The order operated to deprive petitioner of its property without due process of law in that it permitted the consumers to burn gas twenty-four hours every day while the pressure was less than 1 ounce, and yet absolutely denied petitioner any compensation whatsoever for the gas burned.

There were times when the pressure was less than 1 ounce. The pressure at each regulator station was registered by an automatic recording chart, which recorded the pressure during each hour of each day. The average pressure maintained each day was determined from the various pressures maintained during each hour thereof, and the average pressure during the month was deter-

mined from the average daily pressures, and the discounts were arrived at in that way. Pressures under 1 ounce entered into the calculation.

We have shown that gas furnished at ½ ounce pressure is only 1.5 per cent deficient in quantity and heat units as compared with gas furnished at 4 ounces, and that 50 per cent of the volume or quantity will flow through the consumer's service pipe at 1 ounce pressure that will pass through in the same time at 4 ounces. In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the pressure prescribed by the Act which this Court held void was not less than 1 inch nor more than 2½ inches of water, which equaled a pressure ranging from six-tenths of an ounce to 1¾ ounces. But under this order of the Oklahoma Commission, gas furnished at six-tenths of an ounce, or even at nine-tenths of an ounce, or ninety-nine hundredths of an ounce, was absolutely free. The undisputed evidence was that ½ ounce was a usable pressure. The Gas Commission of New York considered artificial gas at six-tenths of an ounce, containing only half the heat units of natural gas, to be not only usable but satisfactory.

Of course, the plainest case of deprivation of property without due process of law is the taking of the property from its owner by the State, through some of its agencies, and giving it to another without compensation

to the owner. The principle applicable is so elemental as to need the citation of no authorities. However, see *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin*, 238 U. S. 491; *Davidson* v. *New Orleans*, 96 U. S. 97; *Missouri Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403.

CONCLUSION.

The shortage in question was not peculiar to petitioner. It was nation-wide. It will happen again.

At a conference called by the Secretary of the Interior and held in Washington on January 15, 1920, immediately following the shortage, "for the purpose," to quote the Secretary's language, "of devising a plan for the conservation of the Nation's rapidly failing supply of natural gas" (R. 85-6, 115-16, 140-1), the report of which is available through the Bureau of Mines, Eugene Wesley Shaw, of the United States Geological Survey, said:

> "As it is, the life of the fields, owing to many causes, is going to be only a few years. *Shortages have already been felt in the majority of gas using communities*, and many consumers have gone back to the use of coal and artificial gas."

Mr. J. A. Bownocker, State Geologist of Ohio, said:

> "The supply, however, under most favorable conditions, is limited, and we have now reached the stage in the industry where it is difficult, if not impossible, to meet the demand not only of new consumers, but of those who have been relying on this

fuel for many years. *In short, we are haunted by the specter of insufficient gas.*"

Franklin K. Lane, Secretary of the Interior, in opening the conferences, said:

"The natural gas situation is acute. As there are over 2,400,000 domestic natural gas consumers, the national aspect is obvious."

Dr. George Otis Smith, Director of the United States Geological Survey, said:

"*Geology and engineering cannot find for the use of man what no longer exists. Natural gas is a mine that is largely worked out; it has seen its best days, and future dividends to the Nation cannot equal those of the past.*"

Dr. Frederick G. Cottrell, who, as Director of the Bureau of Mines, presided over the conference, said:

"As you are aware, there has been a condition of shortage of natural gas in many communities during recent years which has shown a tendency to become more acute each succeeding season. I wish that I could give you some assurance that this is but a temporary matter, and that a supply of natural gas would be found to solve this vexing problem; unfortunately this is an assurance which I cannot give, for I am advised by the Geological Survey, by the engineers of the Bureau of Mines, by all geologists and engineers familiar with gas production in the United States, that natural gas is a wasting asset, and that it is not being replaced by nature, one that can be extracted from the earth with great rapidity, and that we are faced with a waning supply which will make it increasingly difficult in the future to supply the present users of natural gas."

As the supply of gas in Oklahoma becomes further depleted, shortages will occur more often and will be more pronounced, until finally natural gas will come to be used only as artificial gas is used, which will mean a still larger investment for procuring and furnishing it, a greater expense in doing so, and the sale of a much smaller quantity. Finally it will be exhausted entirely, and the cities large enough to support artificial gas plants will go to artificial gas, and the others to wood, coal and oil. That has been the case in all natural gas using states as the supply became exhausted. And when that day shall have come in Oklahoma, an order then made penalizing petitioner's successor for not furnishing an adequate supply at 4 ounces pressure would be no more arbitrary and unreasonable than is the present order under this record.

DAVID A. RICHARDSON,
STREETER B. FLYNN,
Attorneys for Petitioners.

Of Counsel:

SAMUEL W. HAYES,
ROBERT M. RAINEY,
ARTHUR W. GILLILAND.